MEMORANDUM

State of Alaska

TO: Ross Kopperud
Assistant Attorney General
Fairbanks

DATE: October

FILE NO.

TELEPHONE NO:

FROM: David LeBlond
Assistant Attorney General
Juneau

SUBJECT: "47' Act
Notice of Utilization

The 1947 Act, 49 USC 321 (d) provides that in all patents for lands in the Territory of Alaska there shall be expressed that there is reserved a right-of-way for roads, etc., constructed or to be constructed. The Act was repealed effective July 1, 1959, by the Alaska Omnibus Act. It is discussed in the following opinions:

Hillstrand v. State, 181 F. Supp 219
Myers v. U.S., 210 F. Suppl. 695
Myers v. U.S., 378 F.2d 696

The legislative history of the Act reveals that Congress was concerned with the instances where it was necessary to locate rights-of-way across lands to which title had passed from the United States. Locating rights-of-way on the public domain was no problem. Congress intended by the enactment of 48 USC 321(d) to avoid the expense and delay of court action and the expenditure of federal funds in obtaining rights-of-way across patented lands for public roads in Alaska. That purpose was accomplished by requiring that all patents reserve rights-of-way for roads. The reservation operated to confirm existing rights-of-way and allow the subsequent utilization of additional rights-of-way as might be elected. The Act had no effect on lands in the public domain but only upon lands patented after its enactment.

It appears to me that no right-of-way was acquired under the 1961 Notice of Utilization. 48 USC 321 (d) had absolutely no effect except as requiring a reservation of rights-of-way in patents. Only where such a reservation was made could a right-of-way be utilized pursuant to the Act. In 1961 Bernard Darling's land was still public domain. There had been no patent and hence no reservation of rights-of-way. While a right-of-way might well have been acquired in 1961, it could not be acquired by a pupported utilization of a right-of-way reserved under 48 USC 321(d).

In other words, until the land was patented, there could be no utilization of a right-of-way pursuant to 48 USC 321 (d). Therefore the 1961 Notice of Utilization was premature since the land was still public domain. Unless Bernard Darling took his patent subject to an existing right-of-way established on the public domain by some authority other than 48 USC 321(d), he took it free of any rights-of-way not specifically reserved. Since 48 USC 321(d) was repealed before the patent was granted, no rights-of-way for roads were reserved.

It appears to me that the Notice of Utilization is wholly ineffective and that no right-of-way could possibly have been acquired by virtue of it pursuant to 48 USC 321(d).